

FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

[REDACTED]

PRELIMINARY RECITALS

Pursuant to a petition filed November 05, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by Care Wisconsin Inc. in regard to Medical Assistance, a hearing was held on May 07, 2015, at Madison, Wisconsin. At the request of petitioner's father and representative, [REDACTED], hearings set for November 18, 2014, December 16, 2014, January 20, 2015, February 11, 2015, and March 18, 2015 were rescheduled. The March 18, 2015 hearing was begun but needed to be rescheduled because Care Wisconsin legitimately requested a reschedule due to petitioner not sending to the agency a copy of 50 pages of documents to review prior to that hearing.

From the May 7, 2015 evidentiary hearing, the following are the general issues in the petitioner's two DHA appeals: 1) [REDACTED] - Whether Care WI correctly determined in its 9-5-2014 notice to petitioner that petitioner no longer met the nursing home level of care, and discontinued petitioner's Partnership Program eligibility and benefits effective 9-26-2014; and 2)) FCP/160877 - Whether Care WI correctly reduced the petitioner's Supportive Home Care (SHC) hours from 16.25 to 3.25 hours per week effective October 1, 2014 (in its 09-16-2014 notice).

At the conclusion of the May 7, 2015 hearing for the above two cases, this ALJ agreed to hold the record open for the following to take place: a) On May 14, 2015, Mr. [REDACTED] confirmed in his e mail that "[REDACTED] ([REDACTED]) will not disenroll and agrees to be re-screened;" b) [REDACTED] sent a May 15, 2015 letter to DHA stating that petitioner has decided not to disenroll from Care Wisconsin, and has chosen to have his care team complete a new functional screen. Care Wisconsin will have the results of the new screen to you within 1 month;" c) Based upon the completion of that new screen by Care Wisconsin of petitioner, Care Wisconsin sent to me (with a copy to Mr. [REDACTED]) by June 16, 2015 a complete copy of the re-screening, and a detailed statement regarding the results of that re-screening. By June 23, 2015, Mr. [REDACTED] had the opportunity to send to me (with a copy to [REDACTED]) his written response to Care WI's re-screening and detailed statement or summary.

Care Wisconsin submitted on June 16, 2015 a copy of the completed June 15, 2015 functional rescreening of petitioner and its written closing argument to DHA and to petitioners' representative. [REDACTED] failed to submit any responsive closing argument by June 23, 2015 or even by the date of this decision. Based upon careful review of the new June 15, 2015 functional screen and that the decision in this case has been delayed for almost one year (five petitioner reschedules and then a June 5, 2015 re-screening), no further written arguments are needed from the parties. The record is complete and sufficient to provide reliable information and evidence on which to make a decision.

[REDACTED]

The remaining issue for determination in the instant appeal is whether Care Wisconsin correctly determined that petitioner no longer met the Nursing Home Level of Care requirements for continuation in the Family Care (FC)/Partnership Program (PP), and discontinued that eligibility and benefits effective September 26, 2014.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Liz Wesolek, member rights specialist
Care Wisconsin First, Inc.
2802 International Lane
Madison, WI 53704-3124

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (a/k/a "[REDACTED]") (CARES # [REDACTED]) is a 26 year old resident of Dane County who resides with his father.
2. The petitioner has been a recipient of benefits from the Family Care (FC)/Partnership Program (PP) since about December 27, 2013.
3. To remain eligible, the recipient must periodically undergo long term care functional screenings (LTC) to determine whether he continues to have functional care needs at the requisite level of care. The petitioner underwent such functional screenings on September 5, 2014.
4. As a result of that September 5, 2014 functional screenings, the FC/PP program determined that the petitioner was no longer functionally eligible for continuation in the program.
5. On September 25, 2014, the agency issued notice to the petitioner advising him that he was no longer eligible for "nursing home level" FC/Partnership benefits due to his failure to satisfy the nursing home related functional eligibility requirements of the program. The petitioner's father timely appealed for the petitioner.
6. The petitioner, age 26, has diagnoses of Psychotic disorder NOS, depersonalization disorder, anxiety, and aggressive behavior. For purposes of program eligibility, the petitioner continues to meet the Severe and persistent mental illness target group as a "long-term condition." Petitioner has a history of pulmonary embolism and continues on anti-coagulation therapy. However, the medical evidence indicates that his past history of pulmonary embolism has not impaired his functioning during the relevant period of this appeal.

- [REDACTED]
7. Activities of Daily Living (*ADLs*). The petitioner is ambulatory and independent in bathing, eating, toileting, transferring and grooming. He is able to shower and dress independently without pain, shortness of breath, or dizziness. The petitioner is independent with walking without use of any mobility device. The petitioner is independent in all his ADLs.
 8. Instrumental Activities of Daily Living (*IADLs*). The petitioner is able to ingest medication independently, but frequently forgets to take medication. The petitioner does not need physical assistance with laundry/household chores and meal preparation. He reports he enjoys cooking and is able to independently make a simple sandwich, pizza, or macaroni. He is independent in money management, and the use of a telephone. He has a driver's license, but does not drive an automobile due to occasionally "freezing up" when he is unable to communicate or respond to others (or the sedating effects of his psychiatric medications). However, his "freezing up" episodes have decreased, and usually last only for a few minutes on a daily basis. Those brief episodes do not prevent petitioner from completion of his ADLs. The petitioner is not employed, but wants to obtain some type of employment through DVR. He does not require overnight supervision by his father or any other person. The petitioner is fully communicative, is not physically resistive to care, does not wander, has not demonstrated self-injurious behavior, is not violent towards others, and does not engage in substance abuse. His **three** areas needing assistance in IADLs are medication management on a daily basis, transportation (can't drive) and laundry once per week (mostly transportation related).
 9. Petitioner's psychiatrist, [REDACTED] noted the following from her May 18, 2015 and June 8, 2015 re-evaluations of petitioner (as part of jointly agreed upon re-assessment/re-screening): a) **"he does not require in-home care for his safety or any other reason (6-8-15 note);"** b) he is oriented to person, place and time; c) petitioner does not express delusional thinking and no psychomotor agitation or retardation; d) petitioner denied paranoia, hearing voices or hallucinations; e) he reported not having any freezing episodes "in a while;" f) he denied issues with short-term or long term memory, and denies alcohol or illicit drug use; h) petitioner purposely leaves his home at times, and is not just "wandering."
 10. By mutual consent and with petitioner's father present with the petitioner, the petitioner completed a June 5, 2015 functional care rescreening by [REDACTED]. In the June 15, 2015 rescreening results, the rescreening confirmed with detailed information and evidence that FC/Partnership program correctly determined that petitioner was not eligible for "nursing home level" FC/Partnership benefits due to his failure to satisfy the nursing home related functional eligibility requirements of the program.
 11. In its June 16, 2015 written closing argument, Care Wisconsin persuasively argued based upon Dr. [REDACTED] evaluations of petitioner, his functional screens, and the hearing testimony and evidence, that Care Wisconsin correctly determined that petitioner no longer met the Nursing Home Level of Care requirements for continuation in the Family Care (FC)/Partnership Program, and correctly discontinued that eligibility. Petitioner's representative did not submit any responsive closing argument to DHA. See above Preliminary Recitals.

DISCUSSION

The Family Care Partnership program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults. See, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10. Whenever the local program decides that a person is to be terminated from the program, the client is allowed to file a fair hearing request. The petitioner did so here.

[REDACTED]

In order to qualify for FC/Partnership services, with certain exceptions not applicable here, a person's functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). Essentially, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

I. THE DHS COMPUTERIZED SCREENING TOOL CORRECTLY DETERMINED THAT THE PETITIONER IS NOT FUNCTIONALLY ELIGIBLE AT THE "NURSING HOME CARE LEVEL."

The Wisconsin Department of Health Services has made efforts to improve the statewide accuracy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained screener.

This screener asks the applicant/recipient questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the "Functional Screen Report" for the applicant to the Department's Division of Long Term Care. The Department then evaluates the Long Term Functional Screen data by computer programming to see if the applicant/recipient meets any of the nursing levels of care.

In the initial implementation of the "functional screen" process, the Department employed a statistical consultant to test the use of the "tool" (the Level of Care Functional Screen form, or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant found that the use of the functional screen resulted in a high degree of reliability and consistency. Current policy requires the Department's local agent to utilize this system. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The cross-referenced Level of Care (LOC) Functional Screen form reiterates the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities.

The petitioner's diagnoses are not in dispute, as indicated in Finding of Fact #6 above. Agency assessors determined in the September 2014 screening and the functional rescreening during June, 2015 that the petitioner was able to perform all ADLs independently. I agree with the assessors' findings that the petitioner was capable of performing all ADLs, as indicated in Finding of Fact #7 above. The June, 2015 re-screening correctly determined that petitioner could independently perform his IADLs except three (medication management on a daily basis, transportation (can't drive) and laundry (mostly transportation related) once per week. When the petitioner's functional ability scores were entered into the DHS algorithm in 2014, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

II. RELYING ON STATE CODE, I CONCLUDE THAT THE PETITIONER DOES NOT MEET THE COMPREHENSIVE FUNCTIONAL CAPACITY LEVEL AT THIS TIME.

The petitioner's representative and father, [REDACTED], argued during the May 7, 2015 hearing that Care Wisconsin's functional screen of September 5, 2014 was not reliable because [REDACTED] was "medicated" and because [REDACTED] simply wanted for the screening to be over and thus answered "Yes" to end questioning earlier. Mr. [REDACTED] argued further that due to injections of anti-psychotic drug (Paliperidone Palmitate) to treat his mental health issues, his son was basically "catatonic" and so sedated that his answers to questions would not be reliable until the drugs were eliminated from his system (he asserted the drugs would be out of the petitioner's system by June 1, 2015). Mr. [REDACTED]'s concern about the re-screening was fully addressed because the re-screening did not take place until June 5, 2015, when he agreed that

the injections would be out of his son's system. Mr. [REDACTED] also wanted to be present during the entire re-screening. He was allowed to be present at the re-screening.

As explained in the above Preliminary Recitals, every reasonable effort was made to accommodate petitioner's father's concerns during the June 5, 2015 re-screening. However, despite Mr. [REDACTED]'s arguments and allegations, there was basically no change in the re-screening from the initial screening on August 25, 2015. Instead, the evidence was even stronger for discontinuation of petitioner's Family Care Partnership program eligibility based upon the convincing medical evidence from petitioner's psychiatrist, Dr. [REDACTED]. See Finding of Fact #9 above. Furthermore, during the hearing, petitioner was unable to provide any reliable evidence to refute Care Wisconsin's case. Finally, Care Wisconsin submitted on June 16, 2015 a copy of the completed June 15, 2015 functional rescreening of petitioner and its persuasive written closing argument to DHA and to petitioners' representative. [REDACTED] failed to submit any responsive closing argument by June 23, 2015 or even by the date of this decision.

Independently of the DHS computerized result, it is noted that state code contains a standard for defining "comprehensive functional capacity level." In code, the verbally expressed standard, as opposed to a computer algorithm, for the requisite level of care is as follows:

DHS 10.33 Conditions of functional eligibility.

...

(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY. (a) *Determination.* Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286 (1), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under par. (b) shall be met and, except as provided under sub. (3), the functional capacity level under par. (c) or (d) shall be met.

(b) *Long-term condition.* The person shall have a long-term or irreversible condition.

(c) *Comprehensive functional capacity level.* A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
 - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Wis. Admin. Code §DHS 10.33(2)(a)-(c). ADLs are defined at § DHS 10.13(1m); IADLs are defined at § DHS 10.13(32). The petitioner can perform all ADLs without physical assistance, but cannot perform several IADLs unassisted.

Turning to IADLs, the code defines them for level of care determination purposes as: medication management, meal preparation, money management, using the telephone, arranging/using transportation, and ability to function at a job site. The petitioner has established that he cannot appropriately perform medication administration/management (due to mental health issues), transportation (can't drive) and needs at least transportation to a laundromat to perform (perhaps with some assistance) his weekly laundry. As a result, the petitioner's has three IADLs in which he is not independent. However, because he does not have 4 or more IADLs in which he needs assistance, he does not meet any of the Comprehensive functional capacity level requirements of Wis. Admin. Code §DHS 10.33(2)(c) above.

During the hearing and prior to the hearing, Mr. [REDACTED] was a very argumentative advocate for his son. However, despite such zealous advocacy, he was unable to refute Care Wisconsin's strong testimony and evidence that clearly established that petitioner no longer met the required Level of Care. Accordingly, based upon the above, I must conclude that petitioner does NOT meet the code standard for the comprehensive functional capacity level of the functional eligibility test for continued Family Care Partnership Program continued functional eligibility.

CONCLUSIONS OF LAW

Care Wisconsin correctly determined that petitioner no longer met the level of care functional eligibility requirements for the Family Care (FC)/Partnership Program (PP), and correctly discontinued petitioner's eligibility and benefits effective September 26, 2014.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.



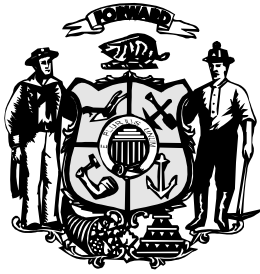
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 31st day of July, 2015

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on July 31, 2015.

Care Wisconsin First, Inc
Office of Family Care Expansion